Supreme Court, U.S.
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No. 93-1492

In The

Supreme Court of the United States

October Term, 1993

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Petitioners,

v.

ELIZABETH McCLELLAND GANT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. When no probate proceedings are pending, is it proper in a diversity case for the U.S. District Court to construe a Testamentary Trust in a Will which was probated 52 years prior thereto and where the State Courts had never construed that portion of the Will or of the Testamentary Trust.

2. Does 28 U.S.C. Sec. 2202, authorize the District Court to make required adjustments in accordance with a prior declaratory judgment when the party directed to make such adjustments failed to do so, and the Court continues to find it necessary and proper.

3. Does the doctrine of preclusion or of res judicata apply to the granting of further necessary or proper relief under 28 U.S.C. Sec. 2202.

4. Does the informal waiver without notice or hearing by the supervising State Court of a testamentary requirement that there must always be two trustees in control, where only one of two beneficiaries participated in the waiver request, give the action of the Court status under the Full Faith and Credit constitutional provisions with respect to a later action by the non-requesting beneficiary to construe the number of Trustees required by the Will.

PARTIES

All parties are named in the caption.

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BRIEF IN OPPOSITION

The Respondent respectfully urges that the Petition for Writ of Certiorari prayed for by the Petitioners herein be denied for the reasons hereinafter set forth.

OPINIONS BELOW

There is no need to refer to a summary of the Opinion, as the Opinion appears in full beginning on page 1a of Appendix A of Petitioner's Petition.

STATEMENT OF CASE

Respondent supplements and contradicts the Petitioners Statement of the case as follows:

Respondent contradicts the statement in the first paragraph that "the Will had already been construed . . . ", as in 1942, not only did the state Probate Court lack power to construe a Will, but such construction was not requested, and all the Probate Court did was to repeat in the Order closing the estate the language of the Will with respect to Respondent.

Respondent objects that the second paragraph of the Statement is misleading, as Citizen's Bank was already a Trustee on October 2, 1968, when the other Trustee had died, and Petitioner The Grand Lodge consented to the entry of an order continuing the Petitioner Bank as sole Trustee despite the Will requirements, which was done without any hearing and without notice to Respondent, and no opportunity for Respondent to object or impose conditions. The facts are correctly referred to in the Opinion of the Tenth Circuit Court of Appeals.

In the third paragraph the objection to the Statement is that it does not point out that the issue of a co-trustee was not actually litigated in the 1987-1988 District Court

proceedings, as also pointed out by the Circuit Court of Appeals decision.

Respondent's objection to the fourth paragraph is that in the last sentence it begs the issue, as the District Court decided that in order to comply with the Tenth Circuit decision, the Petitioner Trustee had a duty to make adjustments in compensation to Respondent in order to assure her an adequate living.

Respondent objects to the sixth paragraph, since it suggests that even passive administration of a trust, which requires no exercise of the Court's discretion or decision-making powers, is the same as assuming jurisdiction for actual administration and interpretation of the trust. In this case, the State Court had not been called upon to do anything since before 1968 but to approve stipulations made by the parties themselves, stating their own agreements, and not requesting anything by way of a decision from the Court.

REASONS FOR DENYING THE WRIT

1. There is no justification for the granting of a Writ in this case as the lower Court actually followed Supreme Court decisions as well as other Tenth Circuit decisions and carefully refrained from doing anything that would interfere with the State Court's jurisdiction whenever it was needed to be exercised. Rather than generalize, Respondent will take up the reasons with the same numbering of subject matter as contained in the Petition.

I.

There was no interference with the State Court because the supposed construction by the Probate Court never occurred and the State District Court was not controlling or exercising discretion as to estate administration, but merely acted passively when the parties would agree to the terms of an order. The appointment of Citizen's Bank as sole trustee was not the result of a request for construction of the Will, but simply the result of one of the beneficiaries requesting a variance and the other beneficiary not being consulted. It is obvious that the Will provided for two trustees and the Court of Appeals could not have construed it any differently. Petitioners' suggestions that there has been interference with the State Court is without any merit whatsoever as for many years the State Court has not been requested to exercise any discretion. The State Court might have had jurisdiction if the trustee had requested construction of the Will under the New Mexico Declaratory Judgment Act. This it failed to do and persistently failed to do. It allowed a fund to be built up from an initial cash amount of approximately $55,000 to over several million dollars during a time when the income beneficiary was forced to negotiate for whatever the remainder beneficiary would agree to in lieu of a judicial determination of "an amount sufficient to insure "Respondent" an adequate living," where each Stipulation contained a provision reserving the right of the remainder beneficiary to reduce the payments to Respondent to $1,800 per year at any time and thereupon Respondent could apply to the Court for a construction of the Will. Presumably the State Court saw these Stipulations and did nothing to correct them, and obviously the

Bank as trustee knew about them and knew about the Orders that followed the Stipulations and carried them into effect and did nothing with respect to requesting the Court to construe the Will. None of the cases cited by Petitioners support their points. They cited *Swanson v. Bates*, 170 F.2d 648 (10th Cir. 1948), a case where there was pending in the State Court a hearing on the final account and report in the case involved, and a date had been set for that hearing and, under those circumstances, the Federal Courts were held not to be able to interfere. That is an entirely different situation from the one at Bar where the State Court has not set anything for a hearing for many, many years, and there could be no interference with the State Court's jurisdiction when the Federal Court acted in a Declaratory Judgment proceeding.

II.

Both of Petitioners points mentioned here were fully dealt with in the Opinion of the Court of Appeals, as set forth under the heading "Jurisdiction" beginning in the Appendix to the Petition on pages 5a-7a. The case cited by Petitioners on page 7 is a criminal case and the principle attributed to it at the bottom of page 7 is part of dicta which contains numerous qualifications. The case involves constitutional rights and criminal prosecution for self-incrimination, after relying on the statutory waiver to allow a defendant to testify and preserve his rights.

All of the relief granted was to assure that Respondent received a sufficient amount to comply with testator's intention to ensure her an adequate living. The

language of the 1988 decision in this regard retained jurisdiction to enforce the decree, and the 1992 Order accomplishes this.

III.

Perhaps it is significant that in all of their argument under Reason No. 3 for granting the Writ Petitioners refer to Texts in general, and then to a quotation from a particular criminal case, in order to attempt to prevent the enforcement of the two-trustee provisions of the Will, and in order to avoid the payment of attorney fees for services which their own actions have made necessary. On pages 7a to 10a of Appendix A of their Petition, the Court of Appeals fully answered their contentions.

The Court's stated basis in 1992 for awarding attorney fees was on a different cause of action from that stated by Respondent in the 1986 complaint, as to which attorney fees were denied in the 1988 Judgment. Plaintiff included in her 1991 Motion for further relief substantiated statements that she expressly asked defendant Grand Lodge in January 1990 to deal directly with her to eliminate attorney fee expenses for her based on the 1988 Judgment and the use of the expert witness who had testified as to adjusting the support amount by relating it to the Consumer Price Index, and that in February 1990 the Fort Worth, Texas attorneys purporting to represent the Grand Lodge officials declined to even discuss the matters plaintiff was concerned with, stating that they were "totally satisfied with the bank's handling of the estate."

Accordingly, in 1991 the record attorney for the trustee and the Grand Lodge was duly requested by Respondent to consent to the granting of further relief, such consent was refused, and Respondent filed the Motion, the rulings upon which in her favor are the reasons for Petitioners' dissatisfaction. Petitioners forced upon Respondent the court proceedings for further construction of the Will. Such proceedings are for the benefit of the trust, as they furnish guidance as to how to handle problems in dispute. Petitioners could have but chose not to seek Court construction; Respondent was forced to do so to obtain court guidance. The Court decided that the adequate living assurance was not intended to be diminished by legal expenses forced upon Respondent by refusal of Petitioners to comply with prior Will construction by the Court, by invoking the most technical of grounds, and even then being unable to justify them. The Court of Appeals also recognized that the newly additional expenses forced upon Respondent after 1988 of litigating the construction of the Will were extraordinary expenses pertaining to different years as to which the Will required reimbursement. If not so construed, the Trustee could thwart the testators' intention by constant litigation over support for each year, using its position as a fiduciary and the ample funds of the trust to make the income beneficiary a bankrupt beneficiary.

The existence of new Trustee problems, and the reluctance to comply with decisions duly adjudicated, resulted in new issues of trustee duties brought about by Petitioners, making additional litigation expense for Respondent on matters not involved in prior rulings on entitlement to attorney fees.

It should be noted that the Court's granting of attorney fees was not based upon the quoted statutory authorizations, but upon the provisions of the Will which would require that the income beneficiary receive the intended income over and above any expenditures caused to her without her fault.

IV.

Reasons expressed by the Petitioners under this heading are a repetition of previous arguments, in effect stating that it was established in the 1988 judgment that the law of the case was that the Respondent (Petitioner in the original proceeding) should not be awarded attorney fees. In this argument at this time the Petitioners ignore the fact that attorney fees were expressly awarded for legal services subsequent to the February 10, 1988 judgment. There was no retroactive award of attorney fees.

The case that Petitioners cite in support of their argument that there is a conflict between the Tenth and the Fifth Circuit is one that is based on the lack of statutory authorization for attorney fees in the state of New York at the time of the decision. Attorney fees are authorized by statute in New Mexico and there is no conflict between the Circuits. (The reasoning of the Court, as pointed out in the discussion under the previous paragraph, was based on the requirement in the Will that the testator's granddaughter receive an amount sufficient to assure her an adequate living, over and above expenses, such as attorney fees, being forced upon her by the other parties involved. As part of the discussion of this matter, the

opinion of the Court of Appeals, as set forth in Petitioners' Appendix A on pages 9a and 10a, the attorney fees were considered extraordinary expenses by the District Court and the Court of Appeals stated "The 1992 Order thus pertained to different years, was supported by a different rationale, and was encompassed in the broad authority conveyed by section 2202.") As "icing on the cake," on page 10a the Court of Appeals pointed out that it has held in a diversity case that fees can be awarded as damages even though not recoverable under state law.

New Mexico statutes authorize the payment and awarding of attorney's fees in trust matters. Section 46-3-12.A.(3)&(4), *New Mexico Statutes Annotated*, 1978 Compilation, as Amended, provides in part:

> "A. The following charges shall be made against income: . . .
>
> (4) court costs, attorneys fees and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise; . . . "

In the same Section appears the following further provision:

> "C. The following charges shall be made against principal: . . .
>
> (2) charges not provided for in Sub Section A, including . . . expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property; . . . "

V.

The argument of Petitioners under this point hardly justifies response. Since 1942 there has been a state District Court case file where the McClelland Testamentary trustees could file their annual reports and request court approval and the setting of trustees' fees. In 1968 the corporate trustee after the death of its co-trustee, requested the state Court in a non-adversarial situation to allow it to continue as sole trustee, with the remainder beneficiary's consent, and the Court agreed. The United States District Court has not challenged the 1968 decision, but has applied the appropriate principles to require an end to the departure from the terms of the Will in view of changed conditions in 1988 and thereafter. Twenty years or more after the state Court action circumstances had changed so as to call again for compliance with the strict terms of the Will. The 1968 order by the state Court did not declare that there would never be a need for a second trustee; the 1992 order of the United States District Court did not find fault with the 1968 order of the state Court, but simply found that the changed conditions justified construction of the Will in accordance with the terms specified by the testator.

It should also be noted that the Petitioners have often invoked the statute of limitations, laches, estoppel, and waiver, as against the Respondent in their attempts to prevent relief from being granted her. In the Opinion set forth in the Petition, Appendix A, on page 13a, the Tenth Circuit pointed out that only when the sole trustee failed to perform its fiduciary duties did Ms. Gant become entitled to complain of the harm to her by lack of a second trustee. Because neither the remainderman nor

the trustee has seen fit to employ their respective separate counsel, respondent cannot know whether the opposition to a second trustee is a matter of selfishness on the part of the trustee, or satisfaction on the part of the remainderman; she does know that it has meant a great burden and expense for her.

2. Some of the questions which this Court is now being requested to review were subjects of a prior similar Petition to this Court filed as Case No. 89-233, October Term 1989. They involved the "sanctity" of the 1942 state Probate Court Order and of the 1968 state District Court Order, neither of which involved a contested adjudication or anything in the nature of a declaratory judgment.

As can be observed from a look at page 6 of the prior Petition in No. 89-233, it had also been preceded by a 1989 Petition to the Tenth Circuit Court for Rehearing, and a denial of hearing en banc.

This Court denied Certiorari in 1989, and Respondent submits that Petitioners have failed to justify any different disposition in 1994.

CONCLUSION

Respondent will agree with Petitioners that "This is a classic case . . . ", but she would characterize it as one attempting to get the Supreme Court of the United States to intervene in the administration of a private trust on behalf of a trustee who will make or join in any argument or ground to prevent sharing its trust powers as specified in the Will creating the trust. It is also a case of a trustee

and a remainderman who want to litigate over the income beneficiary's rights until there is nothing left for her, without permitting the Court to carry out the judicially declared terms of the Will that she was to be assured an adequate living. Not only is this a case where this Court has no reason or time to become involved, it is one where the Respondent only wishes that in refusing to become involved this Court could express its judicial attitude toward litigation of this type, in which this is the second attempt of the Petitioners to bring these routine trust matters before this Court for a decision.

The Petition should be denied.

Respectfully submitted

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